IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE:	)	In Proceedings
	)	Under Chapter 7
GRAFTON REPAIR & FLEETING CO.	)	
	)	No. BK 89-50301
Debtor(s).	)	
	)	ADV. 90-0046
DONALD M. SAMSON, TRUSTEE	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
CHARLES L. CRANE AGENCY CO., and MUTUAL MARINE OFFICE OF THE MIDWEST, INC.,	)	
	)	
Defendants.	)	

O R D E R

The vessel M/V Bryan B sank in the Mississippi River on March 4 or 5, 1989. On May 22, 1989, the vessel's owner, Grafton Repair & Fleeting Company (debtor), filed a petition seeking protection under chapter 11 of the Bankruptcy Code. The bankruptcy proceeding was converted to a proceeding under chapter 7 on January 8, 1990. On March 1, 1990, the chapter 7 trustee filed the adversary complaint now pending before the Court. The complaint, as twice amended, seeks recovery from Mutual Marine Office of the Midwest, Inc. (insurer) and Charles L. Crane Agency Company (agent) under a policy of insurance covering the M/V Bryan B. It alleges that defendants breached their obligations under the insurance policy denying coverage for the damage sustained by the M/V Bryan B.

The insurer has asked for judgment on the pleadings and that matter is now before the Court. The insurer argues that because proof

of loss has never been submitted, nor coverage either admitted or denied, conditions precedent to recovery on a claim for breach of insurance contract have not been met.[1] However, the complaint alleges that all conditions precedent under the contract of insurance were satisfied by the debtor.

A copy of the contract of insurance on which the complaint is based is attached to the complaint as exhibit A. In response to the complaint, the insurer has filed an answer which, inter alia, denies that exhibit A to plaintiff's complaint is the insurance polity insuring the M/V Bryan B. Attached to the insurer's answer as exhibit A is a copy of an insurance policy--different from the insurance policy attached as exhibit A to the complaint--which the insurer contends is a copy of the correct policy of insurance. In fact, the schedule of vessels contained in the insurance policy which the insurer has submitted lists coverage of the M/V Bryan B along with three other vessels. The schedule of vessels contained in the policy of insurance submitted by plaintiff refers not to the M/V Bryan B but to a vessel named the Sioux.

Attached to the complaint as exhibit B is a copy of a letter which plaintiff argues is a denial of claim for insurance coverage. The letter bears no letterhead. In its totality, it states as follows:

[1]The agent has filed a motion seeking to join in the insurer's motion for judgment on the pleadings. This motion is granted and further reference to the insurer shall be deemed to include the agent.

March 31, 1989

Mr. Greg Ehlman
Grafton Repair & Fleeting
P.O. Box 86
Grafton, Illinois 62037

Re: M/V Brian [sic] B
(Windy Nairn)
D/L 3/4/89

Dear Greg:

To confirm our conversations and your mutual agreement we are closing our file with no claim on the above loss. Greg, please be sure that Dennis George the diver is paid as you may be in need of his services again.

Sincerely,

Gene Tutoky

GT:km

The insurer argues that this letter is "not a denial of coverage, but a confirmation in writing that no claim (or proof of loss) would be submitted in connection with the sinking of the vessel." To support its contention, the insurer has attached to its answer the affidavit of its claims adjuster, Joyce Robertson, who states that the insurer has received no documents constituting satisfactory proof of loss.

For purposes of a motion for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure,[2] the movant must "clearly establish[] that no material issue of fact remains to be resolved and

[2]Rule 12(c) applies in adversary proceedings pursuant to Bankruptcy Rule 7012(b).

that he is entitled to judgment as a matter of law." 5A C. Wright & A. Miller, Federal Practice and Procedure: Civil 2d §1368, at 518 (1990)(footnote omitted). In considering the motion, "the trial court is required to view the facts presented in the pleadings and the inferences to be drawn therefrom in the light most favorable to the nonmoving party....[A]ll of the well pleaded factual allegations in the adversary's pleadings are assumed to be true and all contravening assertions in the movant's pleadings are taken to be false." Id. at 519-20 (footnote omitted).

In the instant case, the insurer has failed to show that it is entitled to judgment as a matter of law. First and foremost, the insurer's argument is premised on the existence of language contained in an insurance contract, which language is said to establish certain conditions precedent to recovery under that contract. However, the Court has before it, not one, but two insurance policies, each of which is claimed to be the governing policy. While the Court is inclined to believe that the policy supplied by the insurer is the applicable policy based on the attached schedules of vessels, the Court is unable to conclude this with the degree of certainty required of a grant of judgment on the pleadings. Indeed, since the Court is not even certain which insurance contract applies, it is hard-pressed to conduct an analysis of compliance with conditions precedent under the contract.

Moreover, even if the Court were to assume that the insurance policy provided by the insurer is the applicable policy, judgment on the pleadings is not warranted. Rule 9(c) of the Federal Rules of

Civil Procedure[3] states that "[i]n pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity." Here, plaintiff has pleaded that debtor complied with all conditions precedent under the policy of insurance and has attached to the complaint a letter which he alleges to be a denial of claim. That is all that Rule 9(c) requires of plaintiff. In response, the insurer contends that the policy language requiring satisfactory proof of loss, the affidavit of its claims adjuster stating she has found no document satisfying a proof of loss requirement, and the letter attached as exhibit B to the complaint indicating that debtor will not file a proof of loss or claim, prove nonperformance of conditions precedent.

However, the fallacy in the insurer's argument is that it presupposes that the requirement of a written proof of loss. In its entirety, the language on which the insurer relies states:

> [I]n case of any casualty or loss which may result in a claim under this policy the assured shall give this Company prompt notice thereof....[4]

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[3]Rule 9(c) applies in adversary proceedings pursuant to Bankruptcy Rule 7009.

[4]Although neglected in the insurer's discussion, the quoted sentence is concluded by the following language:

> ...and reasonable opportunity to be represented on a survey of the damage, each party to name a surveyor, which two surveyors shall proceed to draw specifications as to the extent of the damage and the work required to make the damage good.

> ....
>
> In the case of loss, such loss to be paid in thirty days after satisfactory proof of loss and interest shall have been made and presented to this Company....
> ....
>
> It is a condition of this policy that no suit, action or proceeding for the recovery of any claim for physical loss of or damage to the vessel named herein shall be maintainable in any court of law or equity unless the same be commenced within twelve (12) months next after the calendar date of the happening of the physical loss or damage out of which the said claim arose.

Exhibit A to insurer's answer, §1 at 3, 11. 94-95, at 4, 11. 148-49, at 5, 11. 172-76. Nothing in the policy language quoted above sets forth a requirement that the proof of loss be in writing. Similarly, nothing in the authority cited by the insurer leads to the conclusion that a proof of loss must be in writing where not contractually required. Unlike the vague language of the insurance policy at issue, the cited cases concern policies which mandate that written proof of claim or loss is required and which specify in detail the information that must be produced by the claimant. Since the policy here does neither,[5] the cited cases do nothing to advance the insurer's position. The Court will not impose a contractual condition that is not contained

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Exhibit A to insurer's answer, §1 at 3, 11. 96-99. The insurance contract proceeds to set forth in detail a scheme for resolution of the extent of damages in the event that the two surveyors either agree or disagree with each other. Id. at 11. 88-121.

[5]Neither party has addressed the impact on the matter at hand of the contractual scheme calling for a survey of damages. Accordingly, the Court will not discuss this issue other than to mention that cursory review lends support to the argument that written proof of claim is not required under the contract.

within the contract.

Additionally, there remains a factual question concerning whether satisfactory proof of claim was provided by means of oral communications. The nature of the discussions between the debtor and Gene Tutoky-whomever he may be-that culminated in the letter are factual matters beyond the pleadings that preclude judgment on the pleadings. In fact, inferences may reasonably be drawn from the letter that conversations did occur which focused on those very matters that would constitute proof of claim.

Finally, there is sufficient ambiguity in the letter attached as exhibit B to the complaint to foreclose a determination that the letter represents either a denial of claim or a commemoration of the debtor's decision not to file a claim. In viewing the pleadings in the light most favorable to plaintiff, the Court must resolve the ambiguity against the insurer.

IT IS ORDERED that the agent's motion to join in the insurer's motion for judgment on the pleadings is GRANTED. IT IS FURTHER ORDERED that the motion for judgment on the pleadings is DENIED.

/s/ Kenneth J. Meyers
U.S. BANKRUPTCY JUDGE

ENTERED: September 28, 1990